

Claiming Authority: Criminal Procedure in Seventeenth-Century Swedish Livonia

HEIKKI PIHLAJAMÄKI*

1 Introduction: The political and legal beginnings

What happened to criminal procedure in Livonia during the Swedish period? And to what extent is the development specifically linked to Sweden, or to a European development more generally? Livonia became part of Sweden through the Truce of Altmark in 1629, after having belonged to Poland for almost 70 years (1561–1629). The Livonian Confederation, dissolved in 1561 as a result of the Polish-Swedish war, had been a loose entity consisting of five relatively independent units (the lands of the Livonian Order, the Archbishopric of Riga, and the Bishoprics of Courland, Dorpat, and Ösel-Wiek), which were also internally anything but effectively centralised. The lack of centralisation had brought independence to the local land-owning nobility, and the tradition had very much survived the Polish period. The tradition of the nobility's great independence continued in the Swedish period, not the least because Swedish noblemen now held high stakes themselves, having been enfeoffed on large estates in the conquered Livonia as rewards for their war services. Their position was, therefore, considerably stronger than that of the nobility in Sweden proper.

Another facet adding to the Livonian nobility's independence was that the province was never incorporated into the Swedish Realm, which comprised only Sweden and Finland. This meant that the Livonians were not represented in the Swedish Diet, the local Ritterschaft holding its own Landtag instead.¹

* Professor of Comparative Legal History, University of Helsinki.

¹ The question of incorporation had arisen when Livonia was conquered in the late 1620s. The first Governor-General, Johan Skytte, had been in favour of the incorporation, whereas Axel Oxenstierna was opposed to the idea. The latter's solution was then adopted in the Fundamental Law (*Regeringsform*) of 1634, which sharply distinguished between the core of the Realm, Sweden-Finland, and the provinces. Rosen, "Statsledning och provinspolitik under Sveriges stormaktstid: en författningshistorisk skiss" in *Scandia* 17 (1946), 224–270.

The pressures for unification only grew in the 1680s and 1690s, as the crown postponed a major part of the enfeoffments in the Realm, Livonia included, in the so-called Great Reduction. In 1691, King Charles XI refused to accept the Livonian nobility's claim that King Sigismund's Privilege of 1561 had entitled them to hold their lands as allodial goods, in other words, that they had unlimited right of disposal over their lands. The incorporation of Livonia returned to the agenda, but the idea was again abolished. The Livonians were allowed to keep their *Landtag*, but its powers were markedly reduced, and it came under tighter control by the crown. The governor-general was now to nominate the foreman of the *Landtag*, which could only be summoned with the king's approval, and the *Landtag* was only to handle questions concerning the nobility's contributions to the crown. The position of the Swedish language was, furthermore, strengthened in the administration, so that the nobility would "grow more and more accustomed to the [Swedish] language". A significant reform came with the Swedish Church Law of 1686, which also came into force in Livonia in 1690. The new law radically changed the Livonian church administration. Lower consistories, as members of which noblemen had exerted considerable influence, were abolished and their tasks given to secular authorities and parish priests. A similar "mixed" Upper Consistorium, in which noblemen were also represented, was also abolished and replaced by a spiritual consistory in Dorpat. The nobility lost its *ius patronatus* in most of the parishes, which now came under the crown's control.²

To find out what happened to criminal procedure in Livonia during the Swedish period, we need to know what Livonian criminal procedure was like before the conquest, because legal structures develop from the existing ones. Are the typical features and changes in the Livonian criminal procedure, as seen from the court practise of The Pernau Land Court and The High Court of Dorpat, to be explained by the Swedish development at all? The 1680s and 1690s will be of particular interest, being the decades known for the Swedes taking a firmer grip of the Livonian nobility. Does this show in the criminal procedure?³

2 The context of European criminal law: inquisitorial and accusatorial procedures

Before going into the Livonian criminal law as it figures in the statutes and court practice, it is worthwhile to look into the common European criminal law at the beginning of the seventeenth century, the time of the Swedish conquest. Criminal law and criminal procedure had experienced a fundamental shift in the twelfth and thirteenth centuries; in-

² The fundamental work on these questions is Isberg, *Karl XI och den livländska adeln: studier rörande det karolinska enväldets införande i Livland* (Lindstedts Universitetsbokhandel 1953).

³ The article is based on my forthcoming book on Livonian law and judiciary during the Swedish period. The examples are taken from the material I have collected from the Latvian Historical Archives (Riga) and Estonian State Archive (Tartu).

deed, criminal law and procedure as a separate category emerged during these centuries. Criminal procedure as clearly separate from civil procedure took shape from the times of Pope Innocent III (1198–1216) onwards, when inquisitorial procedure was gradually introduced as a regular part of the canon law of crimes, starting with disciplinary processes against clerics.⁴ If criminal law is understood as a “public criminal law”, as Dietmar Willoweit does, a decisive turning point ought to be connected to the procedural reforms mentioned above. This is because it was the inquisitorial procedure that helped the ecclesiastical and secular political power to gain a monopoly over serious crime. The change took a long time to be completed, however, and its pace was vastly different in different parts of Europe – of which Livonia, as we will see, is one example.

The basic structure of European criminal law remained by and large the same until the early modern period; the next large change was not to take place until the eighteenth century and the Enlightenment. Since its emergence in the twelfth century, the European criminal procedure had been divided into the inquisitorial and the accusatorial, the “extraordinary” and the “ordinary” procedure.⁵ In leading Italian and German scholarly works, the accusatorial procedure was presented as the basic model of criminal procedure, and remained so until the breakdown of the *ancien régime* criminal law in the nineteenth century.⁶ Historians of criminal law have, however, shown this to be factually misleading: at least at the beginning of the sixteenth century, it is said, the inquisitorial procedure had overtaken the accusatorial one in most parts of Europe. According to Eberhardt Schmidt, in German early modern criminal law “beherrscht durch die Tendenz, das Anklageverfahren durch den Inquisitionsprozeß zu verdrängen”, although the accusatorial procedure never completely lost its importance,⁷ as several works on the local legal praxis have confirmed. Early modern states, with their legal orders, sought to limit the participation of the plaintiff. This meant that the inquisitorial procedure was brought to the forefront as far as crime control was concerned. In his classic work on the history of French criminal procedure (*Histoire de la procédure criminelle*) Adhémar

⁴ See Hirte, *Papst Innozenz III., das IV. Lateranum und die Strafverfahren gegen Kleriker: eine registergestützte Untersuchung zur Entwicklung der Verfahrensarten zwischen 1198 und 1216* (Diskord 2005); and Trusen, “Der Inquisitionsprozess: Seine Historische Grundlagen und frühen Formen”, *Zeitschrift der Savigny-Stiftung Kanonistische Abteilung* 74 (1988), 168–230. Hirte has attempted to revise the current opinion expressed by Trusen, according to which the old *fama* procedure against the clerics evolved into an inquisitorial procedure under Innocent III. According to Hirte’s study based on the records of Innocent III, the *fama* procedure did not disappear, although the inquisitorial method appeared in connection with the visitations whenever a *clamor* called for a closer inspection.

⁵ See Jerouschek, “Die Herausbildung des peinlichen Inquisitionsprozesses im Spätmittelalter und in der frühen Neuzeit”, *Zeitschrift für die Gesamte Strafrechtswissenschaft* 104 (1992), 328–360; and Koch, *Denunciatio: Zur Geschichte eines strafprozessualen Rechtsinstituts* (Klostermann 2006).

⁶ See, for instance, Clarus, *Practica Criminalis, in Opera omnia sive Practica civilis atque criminalis, Liber V* (Venice, 1640); and Carpzov, *Practica nova imperialis Saxonia rerum criminalium* (Wittenberg, 1652)

⁷ Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (Göttingen: Vandenhoeck & Ruprecht, 1965), 194–195.

Esmein claimed that the accusatorial procedure, “a remnant of the past”, was rarely used after the fourteenth century. It gradually lost ground, and the Ordinance of 1670 was then wholly dominated by the inquisitorial procedure.⁸ For the German lands, Karl Härter has shown using court records that the accusatorial procedure vanished in some parts of Kurmainz, probably soon after the introduction of Carolina and at the latest by the late sixteenth century.⁹ Although the accusatorial principle remained, in theory, primarily in the *ius commune*, in practice the inquisitorial procedure gained the upper hand in criminal procedure in much of Central Europe by the beginning of the early modern period.

The problem with the recent accounts is, however, that they draw their court practice evidence (if any is used) from the core areas of Europe, France, Germany, and Italy. Esther Cohen has refuted Esmein’s conclusions in a recent work. Cohen emphasises that “whatever or whenever the shift from the accusatorial to the inquisitorial procedure began, it was neither unidirectional nor general. It was a slow process which knew many reversals, and ... one which took shape in different areas at different times”.¹⁰ Generalisations regarding the “European” criminal procedure cannot be made as if the development in those countries were representative of the rest of the continent as well. More area studies are needed from the more peripheral areas. As will be shown, the accusatorial procedure remained pivotally important in seventeenth-century Livonia, and its relation to the inquisitorial procedure was far more complicated than one of the procedural modes simply giving way. Before we go into the Livonian procedure, a brief look at the Swedish criminal procedure will be needed to provide a picture that differs vastly from Esmein’s account of France.

At the beginning of the seventeenth century, the Swedish legal system, although in contact with the Roman-canon *ius commune* since the thirteenth century, had retained many of its archaic features. Lawyers and learned judges were a rare sight in Swedish courts of law, and virtually no Swedish legal science to speak of existed. Whatever “reception” of Roman law there had been in Sweden, the veneer of learned law was thin.¹¹

Whether the Swedish procedure in the seventeenth century was of accusatorial or inquisitorial nature, some movement towards inquisitorial procedure is discernible. For one thing, the legal theory of proof was replacing the ancient procedure based on oaths.

⁸ Esmein, *Histoire de la procédure criminelle en France et spécialement de la procédure inquisitoire depuis le XIIIe siècle jusqu’à nos jours* (Paris: Larose et Forcel, 1882), 108-109. See also Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (The Lawbook Exchange, Ltd. 2013) pp. 210-222.

⁹ Härter, “Regionale Strukturen und Entwicklungslinien frühneuzeitlicher Strafjustiz in einem geistlichen Territorium: Die Kurmainzer Cent Starkenburg”, *Archiv für Hessische Geschichte und Altertumskunde* 54 (1996), pp. 111-162.

¹⁰ Cohen, “Inquiring Once More After the Inquisitorial Process”, in *Die Entstehung des öffentlichen Strafrechts* (ed. Dietmar Willoweit), Böhlau 1999, pp. 42-65.

¹¹ The University of Uppsala had been founded in the late fifteenth century, but had been closed down in the turmoil of the Lutheran Reformation. The University was reopened in the late sixteenth century, but mainly in order to train priests.

The burden of proof shifted logically from the accused to the plaintiff. The officialdom in charge of criminal prosecution was also strengthened. The *länsmän*, bailiffs, now got the right to press charges should the victimised party fail to do so and, in cases involving state finances, a prosecutor's office of its own was established in towns. A significant detail is that in 1682 a royal letter established that whenever there was a "general rumour" that a serious crime had been committed, the judge had to start investigating the case *ex officio*, even though no one was yet suspected of the crime.

As the Lutheran Church also evolved into an important vehicle of social control as far as sexual crime was concerned, it seems that the official mechanisms of crime control were at least strengthening. Criminal sanctions also became harsher, although many of them were not applied to the letter of the law – which was, of course, an inherent part of the criminal law ideology of the time. David Nerhman, the most prominent legal writer of the eighteenth century, describes the Swedish criminal procedure of the Law of the Realm of 1734 in inquisitorial terms¹² and, as we know, the Law of Realm is often taken to summarise the main legal developments of the seventeenth century. Thus, if the Law of the Realm seems inquisitorial, it would be a sign of a development in that direction in the previous century.

Other facts point to the opposite conclusion, however, suggesting that inquisitorial procedure at least was not thoroughly institutionalised during the seventeenth century. As I have shown elsewhere, attempts to introduce legal torture were finally rejected during the second half of the century. Since the rejection was not for humanitarian reasons but practical ones, it is likely that the desire to uncover material truth by official means was not a primary objective, much responsibility still being left for the injured party.¹³ Court records, especially from the more remote corners of the realm, show that the practical reality was often far from inquisitorialness.¹⁴

Curiously, in several German territories the accusatorial procedure also retained its primary position long into the eighteenth century. In East Prussia, the accusatorial procedure was finally abolished in 1724.¹⁵ In Bavaria, the accusatorial procedure was used only occasionally in the middle of the eighteenth century, and the *Theresiana* allowed the accusatorial procedure only exceptionally.¹⁶ In seventeenth-century Baden, all crimes, including the so-called *Real- und Verbalinjurien* were inquisitorially handled. The accu-

¹² [Nehrman–]Ehrensträhle, *Inledning til Then Swenska Processum Criminalem* (Lund: Kiesewetter, 1759).

¹³ See Pihlajamäki, "The Painful Question: The Fate of Judicial Torture in Sweden", *Law and History Review* 25:3 (2007), 557-592.

¹⁴ See, for instance, the digitalised lower court materials from seventeenth-century Finland at <http://www.digiarkisto.org/sshy/kirjat/Tuomiokirjat/RAHAD/RAHAD.htm> (read: November 28th, 2011).

¹⁵ Schmidt, 199-202.

¹⁶ See Wettmann-Jungblut, "Stelen inn rechter hungersnodt": Diebstahl, Eigentumsschutz und strafrechtliche Kontrolle im vorindustriellen Baden 1600-1850", in *Verbrechen, Strafen und soziale Kontrolle: Studien zur historischen Kulturforschung* in (ed. van Dülmen), Fischer 1990), pp. 133- 177, at pp. 142-143.

satorial procedure was completely abolished in Prussia only in 1788. In many territories, the inquisitorial procedure evolved into a “mixed procedure” (*prozessuelle Mischform*), in which the position of the official prosecutor (*Fiskal*) became important. In East Prussian *processum mixtum*, for instance, the *Fiskal* acted as the prosecutor in an accusatorial procedure, but could rely on a previous inquisitorial inquisition. The procedure was thus started with an inquisition, after which the procedure became accusatorial, with the *Fiskal* taking over. Judicial torture could also be used, in which case the inquisitorial features again took over. The accusatorial procedure by no means excluded judicial torture, which is important to understanding some of our Livonian cases. As we shall see, the activities of the official prosecutor play an important role as well.

Some comparative conclusions can already be drawn. First, the regions where inquisitorial procedure overtook the accusatorial procedure in the early modern period were those where the modern state, in the centralised and bureaucratised sense of the word, also developed. Second, the inquisitorial mode of criminal proceedings could not fully develop without an effective corps of trained legal professionals staffing the courts. France clearly met both these criteria, as did some areas in Germany and Italy as well, thus being able to oust the active plaintiff in criminal affairs by the seventeenth century. Sweden also met the criterion of centralisation, but it lacked a corps of professional lawyers. Livonia had or at least soon developed a legal profession, but its loosely structured political organisation was not capable of forcing an effective legal procedure on its nobility.

3 The Livonian criminal procedure

Criminal procedures thus reflect the strength or the lack of the central power, as well as the legal learning available in the local courts. The lack of a strong central government leaves space for the criminal procedures to develop or remain as they are, but the decentralised political system hardly determines precisely how procedures are shaped. The legal learning and social structure of the society comes into the picture instead and is sometimes clearly reflected in the criminal procedures.

Considering the typical background of Livonian jurists in German law schools, it is understandable that the Livonian legal courts were so prone to take over the *gemeines Recht* procedure, which was thus overwhelmingly oriented towards the inquisitorial procedure in the seventeenth century. Formal schooling does not, however, automatically lead to particular solutions if other circumstances are not favourable to them. In Livonia, the criminal procedure was structured by the estate, as was the whole society. The main division was simple: inquisitorial procedure was used only against peasants, whereas criminal cases against noblemen were accusatorial. The accusatorial procedure had an important role to play all through the Swedish period. The statutory basis for the accusatorial and the inquisitorial procedure was still *Constitutio Criminalis Carolina* (the criminal statute of the Holy Roman Empire of the German Nation of 1534) in the seven-

teenth century, although Livonia no longer belonged to the Holy Empire of the German Nation.¹⁷ The accusatorial procedure in its pure form, individual against individual, was common in the Livonian courts all through the Swedish period. According to the *Landgerichtsordnung* of 1632 (Art. XXV), the accusatorial procedure was the main rule in all criminal cases against noblemen, the only exception being the “severe crimes” (“*hochpönliche Laster*”), which were to be processed inquisitorially. The term was obviously a translation of the Swedish *högmål*, which constituted the most serious category of crimes in Sweden proper in the middle ages.

The procedure in accusatorial cases was written to a large extent. Thus when Heinrich von Dam accused Jochim Schumacher of having stuck him with a knife (*injuria realium*) in the Lower Town of Pernau in 1662, von Dam’s advocate, Johann Ficken, handed the charges to the Court in written form (*libellus*). Schumacher, present in the court, replied at once that the incident had not taken place at all as it was stated in the written charge, but that he “had had to act in self-defence”. The Court, however, ordered Schumacher to reply in writing the next day. On the next day, the accused turned up in court again and stated that he had not been able to produce the written reply because he was preparing for a journey. Instead, he asked whether the plaintiff could not appear in person as well. Von Dam’s advocate did not consent to this, because his client was sick.¹⁸ If von Dam and the Court had consented, that would have been an exception to basic written mode of accusatorial procedure.

At the beginning of the Swedish period, the inquisitorial features of the Livonian criminal procedure were undeveloped. The courts did not seem to be particularly active in directing the procedure, and the injured party sometimes even had to bring homicide cases to the court themselves. Maetz, a soldier from Fellin, charged another soldier, Erich Kieffer, in the Pernau Land Court on February 23, 1641, with killing of his brother Thomas, asking the court to sentence Erich to an “ordinary punishment” (*mit der Scherpffen deß rechtenß möchte gestraffet werden, daß er hinwiederumb mit der ordentlichen straeff der thoetschläger möchte beleget vnd abgestraffet werden*). Erich confessed to the charges without being tortured and was executed.¹⁹

¹⁷ v. Blauckenhagen, “Beiträge zur Kenntniß des Strafrechts während der schwedischen Periode in Livland”, in *Dorpater Juristische Studien, Band IV* (eds. Engelmann, Erdmann, von Rohland), Dorpat: Karow 1896, pp. 247-314, at pp. 248-249. See also the *Landgerichtsordnung of Oesel* from the year 1650, which is attached as an appendix to Blauckenhagen’s article. According to article 11 of the statute, “sollen die Urtheile auff die Uralte Landsübliche Recessen und Gebräuche, auch auff Kayserliche Rechte, weil daß Gerichte darauff privilegiret, fundiret und gegründet werden”, and Article 14 states that “In Hochpeinlichen Sachen soll wie vorhin, vermöge Caroli Vti Halßgerichtsordnung verfahren ... werden. Doch soll diese Ordnung nach gelegenheit der Zeit und vorlaufenden Fällen gebessert, gemindert oder gemehrt werden.”

¹⁸ “Bekl. soll morgenden tages schriftlich antwortten, auch beyderseite Parten ihre Zeugen mitbringen.” Pernau lower court 1662, Estonian State Archives (ESA) 1000.1.723, f. 7.

¹⁹ Pernau lower court 1641, ESA.1000.1.723, f. 23 – 23 a. See also, e.g., Jamma Matz vs. Putreck Matz in a homicide case 1640, ESA 915.1.3.

As for minor offences, such as slander, it was all the more clear that the procedure depended entirely on the injured party's actions. In 1640, Christoffer Schiltt accused Berent Eggert of slandering him and his family at his home, and of attacking his wife and his children. Schiltt could not prove his charges, and Eggert was acquitted.²⁰

There were, however, limits to the individual's activity in defending his or her interests. It was important for the courts to sanction independent use of violence. The formula "*sein eigen richter*", to be "one's own judge", figures in the early years of the Swedish period court records. Magnus Anrep, for instance, was punished in 1640 for dragging Arendt von Hursen's serf onto Anrep's own manor and having the serf lashed. Anrep accused the serf of stealing honey and took also a saddle from the serf as a pledge until the honey was replaced. The Court found Anrep's activities unacceptable and punished him for being "his own judge" ("*weilen er sein eigen richter gewest*").²¹

The purest examples of inquisitorial cases in the Livonian courts practice are nevertheless the cases of serious crime, in which peasants stand as the accused, cases sometimes listed as *criminalia* in the courts protocols. They are often also listed using the formula "The Land Court of X *contra* Y", denoting that there is no accusing party (as in the accusatorial processes) but that the court itself undertakes the prosecution. The Pernau Land Court minutes of the years 1688–1690 contain such a list of *Criminalia*. They are not many, only ten altogether, and there is no mention of the proceedings or sentence.²²

What do these cases have in common to warrant their classification as *criminalia*? Clearly the inquisitorial procedure: eight of the cases are court-driven ("Das Königl. Landgrt ex officio"), whereas one is prosecuted by the pastor and one by a peasant against the *Cubias*, foreman of the peasants. Those on the list share one more trait, all of them being serious crimes: homicide, infanticide, desertions, blasphemy and incest – which, logically, do not figure in the ordinary minutes. The pastor's case seems only to have dealt with the slandering of the pastor and his wife, although "grossly", and one of the cases remains otherwise unclear ("*verheliget*"). Adultery figures in some of the *criminalia* as one of the crimes, but clearly it was not by itself sufficient to merit placement in this category. The possibility of inflicting blood sentences was not enough by itself – for instance, adultery was punishable by death. To sum up, in order to be classified as an ordinary crime, a wrongdoing had to be severe enough, and they were practically all handled inquisitorially by the court. All of the accused were peasants.

²⁰ Pernau lower court 1640, 915.1.3.f. 11a –12a. Eggert did not deny having used calumnious words, but claimed not to have intended to slander. The Court concluded that no he had not spoken *animo injuriandi*.

²¹ ESA 915.1.3. f. 23 a.

²² Pernau Land Court 1690, f. 732–733.

Denunciatory cases also appear.²³ However, the *ius commune* theory did not draw far-reaching consequences about the way criminal cases were initiated. Even though the case was basically an accusatorial (or denunciatory) one, the court could assume charge of actively leading the process and could apply judicial torture if deemed necessary. As Massimo Meccarelli has shown, the judicial *arbitrium* in the *ius commune* procedure brought considerable flexibility as to what the course (*iter*) a case could assume. Even though a case could start as accusatorial or by way of a denunciation, it could later be taken over by the court and thus change into an inquisitorial one.²⁴

The way the Land Court of Pernau 1640-41 handled the case of four peasants accused of the murder of a Finnish soldier fits the picture of the *ius commune* criminal procedure as being flexible. The case against Zeamick Ewert, Pick Peter, Sava Otti and Lutzin Bertel was brought to the Court by the “denunciation” (*delatio*) of Wilibalt von Bergen, a nobleman, and the “charge” (*Anklage*) of the wife of the murdered soldier. Technically, the case was thus a mixture of an accusatorial and a denunciatory one. Although torture was not applied in this case, the court otherwise did everything it could to solve the case, where von Bergen and the victim’s wife did not figure actively in the proceedings after they had brought the case to court. The Court’s primary concern was, of course, to have the accused confess. This was not easy, and one of the accused, Zeamick Ewert, seemed particularly stubborn, claiming that Pick Peter and Lutzin Bertel had been the killers. The other three confessed more easily to the most of the charges. The Court took advantage of this, using the interrogatory technique of “confrontation” (*confrontatio*), which meant interrogating the suspects simultaneously. This proved successful, and having heard Peter and Bertel testify against him, Ewert’s resistance broke down and he confessed as well.²⁵

A sub-category of the inquisitorial cases – or of denunciatory cases – was those in which the lower courts proceeded on the basis of a “delinquent list” (*Delinquentenzettel, lista delinquentium*) provided by a local pastor. The pastor thus initiated the case, after which the investigation was taken over by the court. On June 29, 1640, pastor Christophorus Sevarius brought three cases to the Land Court of Pernau holding assizes at the Rugen Manor. One of them involved infanticide and the two other cases fornication.²⁶

²³ In early modern criminal procedure, denunciatory procedure was the third form of procedure apart from the accusatorial and inquisitorial ones. In denunciatory procedure, the victim (or the victim’s family) brought the case to the court, after which the court proceeded actively to investigate the case, much the same way as in the inquisitorial proceedings.

²⁴ Meccarelli, *Arbitrium : Un aspetto sistematico degli ordinamenti giuridici in età di diritto comune* (Milan : Giuffrè 1998).

²⁵ ESA 915.1.4. f. 23 a – 27 a. See also, Pernau town court 1641, ESA.1000.1.723, f. 23 a – 27 a. “E. E. Rahttschloß, weiln mann auß allen vmbständen sehe, daß der Inquisitus mehrere Diebstall begangen, daß mti der scharffen frage zu versuchen, ob Er dabei bliebe, daß der Herman mit Ihme daß Diebstalß halber gerahhtschlaget, weiln iener eß leständig läugnet, auch sonstn alles nicht über ein stimmet.”

²⁶ ESA 915.1.3. f. 41 a – 46 a.

These cases show how churchmen actively cooperated with secular authorities in the fight against sexual crime.²⁷

Judicial torture was used regularly, although by no means often, in the early Swedish period, and of course only against peasants or strangers. The procedure followed the *ius commune* mode, which the case of Maye and “the old Saikat woman” (no first name given in the sources) of 1641 shows clearly. In July of 1640, the Pernau Lower Court heard Maye, suspected of infanticide, and the old Saikat woman of assisting the crime. Both denied this, and the Court decided to proceed to torture. The Saikat woman testified against Maye, so the required half a proof was at hand, although the amount of proof is not specifically elaborated upon in the Court’s decision. The Court only states that “since the protocols show and [both of the accused] have participated in the infanticide, but have not been willing to confess, they will be tortured, starting with the old lady.”²⁸ However, suspects could not be tortured without the High Court’s permission; thus, torture was suspended until the High Court of Dorpat gave its approval.²⁹ The High Court took seven months to issue its torture permission, and the case was taken up again at the Pernau Court in February 1641. The old Saikat woman did not confess under torture, but continued blaming Maye alone, saying that in fact she had given birth to twins. Maye denied this, claiming that her child had been born dead. The protocols stress that the accused was then asked “many times, before, during and after the torture” how she had disposed of the body. The torture was continued the following day. She maintained that she had only given birth to one child, but now confessed that she had killed the child and given it to the old Saikat woman, so that she could hide the body with the help of her son. According to the judicial doctrine, the confession had to be repeated after the torture in order to be valid. Maye repeated her confession word by word (“*wörttlichen*”) and was condemned to death. The old Saikat woman, apparently while no full proof could be produced against her, was sentenced to whipping only. And a final observation of interest: the sentence was ordered to be carried out at once, “because the facts were evident and undeniable.”³⁰

Judicial torture lessened towards the last decades of the Swedish period, so much so that it finally disappeared – as in Sweden proper. In 1668, however, the Pernau Town Court decided to torture Karro Hans to find out whether Parrihild Herman had really

²⁷ See also Aalto, *Kirkko ja kruunu siveellisyyden vartijoina: seksuaalirikollisuus, esivalta ja yhteisö Porvoon kihlakunnassa 1621–1700* (Helsinki: Suomen historiallinen seura 1996).

²⁸ “Demnach ex actis criminalibus befindlich, daß Beklagtin Mayge vnd die Saicketsche in diesem Infanticidy crimins beede participiren, vnd aber guettlichen nicht bekennen wollen, woh sie daß kindt gelassen, nach dem eß an die welt kommen; Alß wurden sie beede ad Torturum condemniret, vnd sol der anfang deß tortureß von der Seickettsche gemacht werden.” ESA 915.1.3., f. 46.

²⁹ Vnd wirdt die Tortura suspendiret, bieß diese Sententia vom Königl. Hoffgericht declassiret. ESA 915.1.3., f. 46.

³⁰ ESA 915.1.4., f. 14 a–15.

acted as his accessory in horse theft.³¹ The torture took place “around 3 o’clock” in the morning of April 8th, 1668. The questions were protocolled, as well as the answers. After the torture, Hans was asked, thus approximately according to the theory of judicial torture, whether he still held to what he had said under torture. Hans replied affirmatively, “after which the *actus inquisitionis* was terminated for this time, and the suspect was taken back to his cell” (*Womit der Actus inquisitionis vor dieß mahl geendiget, vndt der gefangener wieder zur vorigen hafft geführt*).³²

However, the dichotomy between accusatorial and inquisitorial cases does not fully encompass the development of criminal procedure in Livonia. At least two other features need treatment before we can come to the conclusions. The first of these features, criminal settlements, was on the decline; the other, involvement of an accusing official on the rise. I will start with the settlements.

4 Settling criminal cases

In the early years parties also often settled criminal cases, which shows how much room for manoeuvre was left to them.³³ This is no wonder, because criminal settlements were not uncommon in early modern Germany either. Against this comparative context, it would be strange if no settlements were found in the Livonian case material. Early modern settlements of criminal cases survived in Germany as long as they did in a procedural environment which was becoming increasingly hostile to arrangements that left too much say for the parties to the criminal cases themselves. This was the grand lineage of the medieval and early modern procedural development.

Even though the inquisitorial procedure was thus vigorously making its way in early modern Europe from the late middle Ages onwards, there are great geographical and temporal variations on this theme. For instance, the German regions most resistant to the *Rezeption*, mainly the ones in which *Sachsenspiegel* was relevant, were also resistant to the inquisitorial procedure. Even if the *Bambergensis* and the *Carolina* already provided for the inquisitorial procedure, local legislation still allowed for *Sühneverträge* in the early seventeenth century. The rising inquisitorial procedure thus existed side by side with the archaic settlements of serious crime for a long time.³⁴ Hardly surprisingly, criminal

³¹ Pernau town court 1688, ESA 1001.1.723., 61.

³² Pernau town court 1688, ESA 1001.1.723., 64–66.

³³ How many of the settlements came to be recorded and how many remained extrajudicial is difficult to say, of course.

³⁴ Deutsch, “Späte Sühne: Zur praktischen und rechtlichen Einordnung der Totschlagsühneverträge in Spätmittelalter und früher Neuzeit”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 122 (2005), pp. 113–149, at pp. 131–137.

settlements were common in Sweden as well. Cases were sometimes settled even at the appeals court level.³⁵

Slander cases are the most typical example of settlements. Could we speak of a kind of *Justiznutzung*, or taking advantage of the law, in the way this term has been utilised in the literature? It has been emphasised that the law was not only imposed on the parties from above, but that the people took advantage of the legal services of the community instead, thus converting courts into instruments they could exploit to press the other party to yield concessions, settlement money and other benefits. From the plaintiff's point of view, the point was not necessarily to have the other party formally convicted, but to further other ends.

The case of Leuco Thomas from 1640 at least shows that the local populace could sometimes be actively involved in the court proceedings. A peasant named Leuco Thomas had, according to Christian Winckelmann, accused him of taking unlawful advantage of his position by selling the manor's corn on his own account. Winckelmann denied this and challenged Thomas to step forward with evidence. Thomas could not produce any and was sentenced to 10 pairs of lashes. At this point, Thomas and his wife turned to the court and asked it to spare him from the punishment, because it might injure him. Thomas had already been kept 14 days in irons, most probably by Winckelmann.

The Administrator would not for a long while let this have any effect on him, but at last and after a plea from [Thomas and his wife] and the intervention of other peasants, he agreed that the Schilter would get off with only five pairs.

The peasants, however, still continued begging:

Because they still did not give up asking for complete absolution of the punishment, and as the Court had him understand that it depended on him whether Thomas would remain unpunished or not, [the Administrator] agreed on Thomas's impunity this time, wherefore Thomas then lay down at his feet and thanked for the pardon.³⁶

Settlements were not always approved, however. In 1690, Prosecutor Philipp Schirm accused the steward of Kirbel Manor, Matthis Donau, of assault on Christoph Beckmann, the steward of Moyseküla. According to the *libellum*, the parties had settled the case after Beckmann had asked the Court for a citation on Donau ("in zwischen beyde theils hi-erüber vereinbahret..."). The settlement could not, however, override public interest ("...so kan dennach dieser Vergleich dem Interesse public nichts derogieren, sondern verdienet billige bestrafung."). It may be that Schirm decided to prosecute for the assault too, be-

³⁵ Karonen, "Rahakkaista sovitteluista valtiovallan väliintuloon: Henkirikosten sovittelu Ruotsin kaupungeissa suurvalta-ajalla", in *Tie tulkintaan: Juhlakirja akatemiaprofessori Heikki Ylikankaalle 6. marraskuuta 1997* (eds. Kekkonen, Aalto, Koivusalo, Kuisma), Helsinki: WSOY 1997, pp. 248–269.

³⁶ EAA, 915.1. 7., f. 119–121.

cause he had already tried to get Donau to answer a fornication charge, for which Schirm was prosecuting again.³⁷

Cases were settled regardless of whether there was evidence for slander or not. In some cases, the minutes tell us that the case was clear, in others it was not. This also goes to show that it was important for the courts to secure social peace by disposing of slander cases that threatened to disturb it. Although witnesses were occasionally heard in these cases, finding out what had actually happened was clearly of secondary importance compared to re-establishing peace.

Settlements in slander cases are often founded in the protocols of Livonian town courts, but less often in the country court papers. This is because the Livonian courts were, at least after the first few years of the Swedish rule, strictly estate-based, and not many slander cases came to the district courts. After the 1640s, minor cases between peasants do not appear in the courts observed here, pure peasant cases, be they slander cases, other petty crime, or civil cases, being decided directly on the manors by peasants' courts. Peasants normally appeared in the district courts only when the other party was of higher social rank, as was in case Christian Winckelmann vs. Leuco Thomas, or when they were charged with *criminalia*, inquisitorially handled "real" criminal cases.

Settlements in court by no means formed the basis of Livonian conflict solution in the seventeenth century. As the century advanced, such settlements became rare. The change cannot, however, be attributed to Swedish influence, be it direct or indirect. Still, it seems to have been possible to settle serious crimes, even homicide cases. Judging by the rarity of homicide settlements, however, they seem to have been on the way to extinction. The only example of this I have in my material is the case of Lellepe Peet and Hans Wardi which, according to the normal practice of *poena extraordinaria*, would almost certainly not have ended up in carrying out of the death penalty, because the deed was either not intentional or at least the intention of the wrongdoer could not be demonstrated.

5 The official prosecutors

Thus, in estimating how active the state was in crime control, we cannot only look at the extent to which the inquisitorial features had taken over the accusatorial traits in the criminal procedure. In addition, even older features could persist. For instance, even though the inquisitorial features dominated the *peinlich* procedure of Kursachsen from the late fifteenth century onwards, elements of ancient oath procedure (for example the *Barprobe*) persisted for a long time.³⁸ As we have seen above, homicide cases in Livonia could still be occasionally settled even when most of these cases were already handled inquisitorially. In addition to these, the changing role of the official prosecutor is fun-

³⁷ Pernau Lower Court 1690, f. 363–369.

³⁸ Lück, "Sühne und Strafgerichtsbarkeit im Kursachsen des 15. und 16. Jahrhunderts", in *Neue Wege strafrechtsgeschichtlicher Forschung* (eds. Schlosser, Willoweit), Böhlau 1999, pp. 83–99, at pp. 81–82.

damentally important in understanding the development of Livonian or any other early modern criminal procedure.

The debate on the role of official prosecutors in the development of the Livonian criminal procedure was started in 1845 by Wilhelm von Bock and his little book *On the History of Criminal Procedure in Livonia* (*Zur Geschichte des Criminalprozesses in Livland*). Von Bock's central claim was that the mixed procedure (*Staatsanklageprozess*) became dominant in the Swedish era.³⁹ Although Bock's findings met with sharp criticism,⁴⁰ his findings still seem credible. Towards the end of the Swedish period, at least, the activity of the official prosecutors appears to have been on the rise.

On the basis of the material available, no statistical evidence for the strengthening of the official prosecutor can be given. However, the available material seems to point to official prosecutors growing more active towards the end of the century. I will give some examples of this trend in what follows. The cases of prosecutorial activity typically had to do with prevention of self-help (taking the law into one's own hands), protection of official interests, sexual and other serious crime, and duels.

Prosecutor Philipp Schirm charged the steward Schwenewandel from Fellin with tearing down and burning a fence in connection with an argument about boundaries. The burning had caused "no little danger" (*kein geringer Schade*) because of the animals moving in the area. Self-help from the side of the accused seemed to anger the Prosecutor the most: he had "no right to cause unrest on another person's property and even less in a violent way".⁴¹ The prevention of self-help was typically something that prosecutors were interested in.

Serious crime was thus one of the natural targets of prosecutorial activity in seventeenth-century Livonia. Sexual crime was one of subjects of social control where prosecutors showed activity, as in the case that prosecutor Schirm in 1690 brought against Jochim Schneck, the weaver, and the "Weibstück" Mari, charged with adultery and fornication. Schirm justified the criminal charge by the threat of divine punishment.⁴²

³⁹ von Bock, *Zur Geschichte des Criminalprozesses in Livland* (Dorpat 1845).

⁴⁰ The dominant figure of nineteenth-century Livonian legal history, Friedrich Georg von Bunge showed that Bock's results were not representative because they were based on relatively slight case material. Schwartz followed Bunge's criticism in his "Zur Geschichte des livländischen Criminalprocesses während der Periode der schwedischen Herrschaft." Schwarz, "Zur Geschichte des livländischen Criminalprocesses während der Periode der schwedischen Herrschaft", *Zeitschrift für Rechtswissenschaft herausgegeben von der juristischen Facultät der Universität Dorpat*, zweiter Jahrgang, 1870, 29-80, 99-133, 32.

⁴¹ Pernau Lower Court 1688, f. 128.

⁴² "Wenn hurerey und Ehebruch nicht solte gestraffet werden, würden die schädliche Laster so gemein werden, daß Eß bey keinem für Sünde dürffte geachtet werden, und ungeachtet die hurerey und Ehebruch so wohl in Gött= alß Weltlichen Rechten ernstl. und bey hoher straffe werbohten [...]" See also, Schirm vs. Captain Ebert Engelhardt and his former maid Hilpig Roop. Lower Pernau Court 1690 f. 433; and Schirm v. second lieutenant Arnd Turlau.

At the end of the century, the prosecutor would handle at least some of the cases acting alone as the prosecuting party, with the victims of the alleged crime only as witnesses. Thus in the case of *actor officiosus* Philipp Schirm vs. Gustav Nohthelffer, a merchant from Fellin, Schirm accused Nohthelffer (*in puncto verübter haußgewalt*) of entering the burgher Ebert Doben's house and of attacking Zyriatus Iben, a soldier. According to the charges, Nohthelffer had used a sabre to wound Iben's hand. Interestingly, Schirm justifies the charge by appeal to criminal policy:

...should violent crimes such as this go unpunished, no-one would be able to live in peace in their houses and under their roofs, and despite the fact that domestic peace should be the most protected, Mr. Gustav Nohthelffer gave little thought to this ...⁴³

The victims (Doben and Iben) did not figure as parties to the suit, probably because they did not want a law suit in the first place, but the prosecutor acted nevertheless. In its interlocutory sentence, the court obliged the prosecutor to summon the alleged victims to the court as witnesses.⁴⁴

In the case of *Rittmeister* Schlippenbach vs. Lieutenant Wachtell from 1690, Schirm asked for continuance because even though Schlippenbach had "passed a case involving gross *iniuria*" on to him, the prosecutor had not had time to gather "enough information" on the case.⁴⁵ It seems thus to have been clear to the contemporaries in any case that it was one of the prosecutor's tasks to bring charges for serious crimes. In this case, the discussion makes it clear that the term *atrocissimi iniuria* referred to a duel. The Court of Pernau decided to absolve Wachtell, stating however, that "should the plaintiff not wish to drop the case completely, it is his responsibility to bring it to the next court session *de novo*".

Perhaps not too much attention should be paid to the Court's formulation that it was the plaintiff's, not the prosecutor's, responsibility to bring charges. However, the two ways of pursuing charges in what was certainly seen as a serious breach of the law, were clearly both seen as possible. The duelling cases were thus not purely inquisitorial, and could well proceed accusatorially as well. This goes to show that the limits of the procedural modes were flexible and often influenced by practical considerations.

Duelling cases are one of those points in the history of Livonian criminal procedure where Swedish influence is at its clearest. The duel, a typical early modern phenomenon in many parts of Europe, had become such a problem in Sweden that a law against it

⁴³ "...daß wenn Gewaltthaten nicht solten gestraffet werden, würde keiner in seiner Hütten, und unter seinem Dache gesichert leben können, und ohngeachtet der hauß friede am meisten gesichert seyn soll, hatt dennoch beKlr. Mons: Gustav Nohthelffer dieses wenig betrachtet..." Pernau Land Court 1690, f. 169–171.

⁴⁴ Pernau Land Court 1690, f. 432.

⁴⁵ Pernau Land Court 1690, f. 480–481.

was issued in 1682 (*Duellplacat*).⁴⁶ Studies lacking, it is difficult to say whether duels had really increased in Sweden, or whether the *Duellplacat* was merely part of the crown's campaign against the nobility, duelling typically belonging to the "autonomous" sphere of this estate. Whatever the case, the official prosecutors in Livonia took the *Duellplacat* seriously. In the Archive of the Dorpat High Court, traces of 28 duelling cases remain in 1670-1690. When divided into five-year periods, the spread of these cases looks like this: 1671-75: 5 cases, 1676-80: 0 cases, 1681-85: 20 cases, and 1686-90: 3 cases. A clear majority of the cases thus falls into the 1680s and thus into the period immediately following the issuance of the *Duellplacat*.

The prosecutors, however, lacked the means for effective crime control. All of the duelling cases were handled accusatorially, with the high court prosecutor (*Oberfiskal*) acting as the plaintiff. As was typical of the accusatorial cases, the process in duelling cases was largely written. The defendants often did not show up, and the prosecutor's action seemed to lead nowhere.⁴⁷ When defendants showed up for trial, they were often acquitted – as in the Wachtell case above.

The duelling cases were of course serious as crimes, and they also had to do with public order. The wish to maintain public order was also otherwise typical of the prosecutorial cases, as when Prosecutor Philipp Schirm brought charges against Jacob Bremer for robbery (*rapina ex violentiarum*). The alleged crime had taken place on a highway and was particularly serious. Schirm noted that "this kind of open street violence especially" should be curbed and "the highway secured in the future".⁴⁸

Some of the official prosecution cases were clearly intended to uphold social order, even when the crime itself may not have been serious. A class of legal cases in which potential private accusers were completely lacking was the various modes of disrespect towards authorities. This was a natural field of activity for public prosecutors. To uphold the crown's honour, it was especially important to keep order in court. The officers Arent Turlau, Dettloff v. Plate and David Remling were therefore charged by Schirm in 1688 for contempt of court ("improper behaviour against each other before the Court"; "*in puncto immodesten verfahrnung gegen einander vor Gericht*"). It was, however, often difficult to get noblemen to appear in court as accused, even though the courts threatened them with

⁴⁶ An earlier *Duellplacat* had been issued in 1662, and duels were again forbidden in the See and War Articles of 1686.

⁴⁷ See, for instance, the official prosecutor vs. Lieutenant Georg Stackelberg (*provocatio ad duellum*). Even summoning did not manage to bring Stackelberg to court. In absentia "in hundert dahl. Silb: Mtz. dem Gerichte für Straffe und Actori officioso die Expensen." 28.10.1693.

⁴⁸ Pernau Land Court 1688, f. 50-57.

punishment.⁴⁹ Thus in 1690 Schirm cited Lieutenant Johan Grack to the Lower Court of Pernau for disrespecting a court order (*vilipendierung gerichtlichen befehls*).

In another case at the Pernau Lower Court heard in 1690, Schirm had summoned Lieutenant Daniel Brüning's wife to Pernau Lower Court in 1689 for disrespect of court orders. When it turned out that the Lieutenant was not at home, the court servant (*Gerichtsdienner*) had delivered the summons to his wife instead. According to the prosecutor, she had thrown the envelope away with "highest disrespect and slander" ("zum höchsten despect und beschimpfung").⁵⁰ Although the accused was acquitted for lack of evidence, it represents typical cases in which Livonian prosecutors were interested.

The development of public prosecution was originally linked to the growth of police law in many parts of Europe. The close links between the Livonian prosecutorial offices and police law show in the way the prosecutorial tasks were defined as not only supervising the law in general but especially "der Erfüllung der königlichen Verordnungen, Decrete, Mandate"⁵¹; that is, typically the kinds of statutes likely to include police law.⁵²

On the other hand, classic areas of criminal law in Livonia such as theft depended entirely on the victim's activity. Thus, for instance, in 1688 Lieutenant Colonel Brackell accused Andres Hoch, a soldier, of having stolen a horse at the funeral of Brackell's daughter.⁵³ Slander cases were, it goes without saying, completely beyond the public prosecutor's sphere of action.⁵⁴

6 Conclusions

The Livonian criminal procedure did not change radically during the Swedish reign, remaining extremely estate-based throughout the seventeenth century. The peasants were treated inquisitorially only for serious crimes, their petty crimes being left for the peasant courts on the manors to decide. Noblemen's crimes, the few that ever ended up in the courts, were treated accusatorially in the High Court at Dorpat. The campaign of the Swedish crown against Livonian nobility – so drastic in political and economic terms – did not seem to produce significant consequences for the way criminal procedure was arranged in the province. The pressure of the 1680s on the Livonian nobility was felt to be

⁴⁹ Pernau Land Court 1688, f. 140, 165. "Alß wird Er dahero alß aperte' contumäß et supine negligens in poenam contumacia [...] condemniret [...]" Plate was again charged with improper behaviour in court in 1690, f. 301.

⁵⁰ Pernau Lower Court 1690, f. 293–299.

⁵¹ Oberfiscalsinstruktion 8–10, 15; Kreisfiscalsinstruktion VI.

⁵² See Schwartz, p. 62.

⁵³ Pernau Land Court 1688, f. 211–217.

⁵⁴ For instance, the case of Clas Fürstenberg, blacksmith, against Johann Lüders Scheider, a tailor, both from the Karkus manor. Pernau Land Court 1688, f. 223.

an attempt to control the practice of duelling, but, because of the prevailing accusatorial mode of procedure, the effort did not produce significant results.

The main reason for the stability of the way criminal procedures were organised is that although the autonomy of the Livonian nobility was severely curtailed *vis-à-vis* the Swedish crown, the nobility's relations with the peasants suffered no great changes even during the 1680s and 1690s. Peasants remained tied to the soil and thus also to the peasant courts on the manors. Neither was the Swedish local government, dependent on Livonians themselves as it was, capable of exerting any effective judicial discipline on the noblemen, as the attempt to control duels in the 1680s clearly shows.

Some things changed, however, when the first decades of Swedish rule are compared to the end of the century. The inquisitorial procedures against peasants in lower courts had become more routine, and were always handled inquisitorially without the victims needing to be active. The use of judicial torture ended, which well may have been Swedish influence. The high courts followed each other's decisions, and in 1652 Dorpat High Court even asked the Svea High Court, the most authoritative of the high courts, whether torture was still lawful. The answer was negative. The Svea High Court stated that "torture is not, and for many reasons, in use here in our country".⁵⁵

The greatest change during the Swedish reign was that the official prosecutors clearly grew more active. This change, however, is difficult to link directly to any obvious Swedish influence. Even though parallel development occurred in Sweden proper, it was also parallel to the procedural changes taking place in e.g. German territories.

⁵⁵ "Laga bewisning skier genom egen bekännelse, när swaranden friwiljandes och otwingat in för Rätten [...] bekänner ... men ingen bör pinas och plågas til någon bekännelse, efter som then samma uti Kongl. May:tz Rike obruklig samt i sig sielf fahrlig och owiss är." The same wording was repeated in the Sea Articles of 1685. "Kongl. May:tz Förordning huruledes och hwad wid General och Regementz Rätterne under thes Militie hållas och uti acht tagas bör jämte någre korte Reglor som wid samme Rätter angående Laga Process, ransakning och domb observeras och efterlefwat skole," in Kongl stadgar, förordningar, brev, och resolutioner, ifrån år 1528. in til 1701. angående Justitiae och Executions-Ärender, ed. Schmedemann (Stockholm 1706), p. 837.